

NORTH CAROLINA
ENVIRONMENTAL MANAGEMENT COMMISSION

Minutes of March 5, 2020, Meeting

The North Carolina Environmental Management Commission met on Thursday, March 5, 2020,
in the Ground Floor Hearing Room of the Archdale Building in Raleigh, NC.

Meeting Called to Order: Dr. Stan Meiburg, Chairman

The meeting was called to order at 9:05 a.m. with Chairman Meiburg presiding. He provided the notice required by N.C.G.S. § 163A-159(e).

Present: 15 – Dr. Stan Meiburg (Chairman), Dr. Suzanne Lazorick (Vice-Chair), David W. Anderson, Shannon Arata, Yvonne Bailey, Charles Carter, Donna Davis, Mitch Gillespie, Marion Deerhake, Pat Harris, Steve Keen, John McAdams, Maggie Monast, J.D. Solomon, Donald van der Vaart.

Others Present: Commission Counsel Phillip T. Reynolds

I. Preliminary Matters

1. Approval of minutes from Commission meeting- on January 9, 2020 (attached).

Chairman Meiburg asked for a motion to approve the minutes. **Commissioner Anderson** made a motion to approve the minutes and **Commissioner Bailey** seconded the motion. The minutes passed unanimously.

II. Action Items

20-08 was removed from the agenda.

20-09 Request to Adopt Technical Revisions in Response to RRC Objection – 15A NCAC 02B .0400 & .0500 and 02H .0100, .0400, & .1200

Mike Templeton, Division of Water Resources, made a brief presentation and requested approval of technical revisions to the 54 NPDES permitting and related rules, including three late corrections. The Commission approved re-adoption of the rules in March 2019, with **Commissioner Solomon** as hearing officer. The rules were submitted to the Rules Review Commission (RRC). The RRC counsel responded with extensive technical comments in April 2019. Because the comments were not resolved in the time allowed, the RRC objected to the rules in June 2019 and returned them to the Commission for further action. The DWR staff continued its efforts, and the RRC counsel accepted the staff's responses and rule revisions in February 2020. Due to the extensive technical revisions to the rules since the last public review, **Commissioner Solomon** opted to post the rules for an additional two weeks in February; no comments were received.

The Commission discussed these matters during and following the presentation. **Chairman Meiburg** noted that the extent of the RRC's comments on these rules was unusual, especially given the apparent lack of public interest in the rules, and required considerable effort by the staff to resolve all of the comments. Counsel Reynolds suggested that the high number of comments was likely due to the age of the rules and the adoption of rulemaking standards in the Administrative Procedures Act since that time. **Commissioner Solomon** commented on the need for the divisions to share their rulemaking experiences and lessons learned. The upcoming landfill rules are also older and may require a similar effort to get RRC approval.

Chairman Meiburg voiced his preference to approve the rules as revised, send them to the RRC, and find out the RRC would have concerns about the extent of the revisions. He then invited discussion.

Commissioner Solomon expressed concerns with the rule changes that he had discovered only recently (summarized in an email to the Commissioners). Some might be substantive and need further review by the Division and Commission. Given the extent of the changes, the public should have another opportunity for review and comment. He suggested the rules could be returned to the RRC, minus the revisions he had pointed out, or they could be returned with conditional approval and a request for another public review. Counsel Reynolds explained that, because the RRC objected to the rules and the Commission did not object to that action, the RRC still maintains control of the rules. The Commission must satisfy the technical comments and re-submit the rules to the RRC to respond to the RRC's objection. Otherwise, the Commission could lose the rules altogether.

Chairman Meiburg noted that this is a particularly unusual situation. Many changes have been made to the rules, but many that may appear to be substantive are probably not. The Commission needs to know if the RRC will actually approve this iteration of the rules. While respecting **Commissioner Solomon's** concerns, he recommended moving the rules forward to the RRC.

Commissioner Anderson moved to send the rules to the RRC, and **Commissioner Bailey** seconded the motion.

Commissioner McAdams asked if the regulated community would experience any change due to these regulations. **Commissioner Solomon** responded that we won't know for sure until we implement them. **Commissioner Keen** suggested vetting **Commissioner Solomon's** concerns and including them as part of the rules package sent to the RRC. **Chair Meiburg** said he welcomed continued discussion between **Commissioner Solomon** and the staff about any points of concern, while moving the rules forward to the RRC. If we find mistakes later, we can (and routinely do) make technical changes to address them.

Counsel Reynolds said he could work with Mr. Templeton and **Commissioner Solomon** and then meet with the RRC counsel to make sure we aren't making substantive changes. **Commissioner Keen** agreed this was helpful for transparency purposes. He feels it would be only proper to address **Commissioner Solomon's** professional recommendations and, in order to see what the RRC would like to do, somehow tie that into the motion. Counsel Reynolds offered

to discuss **Commissioner Solomon's** email directly with the RRC counsel to make sure his concerns are addressed.

Commissioner Anderson amended his motion, per **Commissioner Keen's** suggestion, to add that **Chairman Meiburg** and Counsel Reynolds include the concerns and the revised rules to the RRC. **Commissioner Bailey** agreed to the amendment.

The motion passed, with **Commissioners Solomon and McAdams** dissenting. **Commissioner Solomon** noted that he was not displeased with the decision but voted based on procedural, not substantive, concerns; he still prefers another round of public hearing. **Commissioner Solomon** commended Mr. Templeton for his efforts in this matter.

Vice-Chair Lazorick asked if the RRC sometimes sends rules out to public comment or has the authority to do that. Counsel Reynolds said that, if a rule change is substantial, for example, the RRC could direct the agency to conduct further public review.

20-10 Request Adoption of Technical Corrections to Rules 15A NCAC 02B .0103, .0215, .0216, and .0223 (Water Quality Standards and Classifications) and Approval of 30-day Waiver

Commissioner Deerhake (WQC Chair) gave a summary of the WQC's actions on this item from the previous day. **Chairman Meiburg** explained that there are two motions involved with the proposed rulemaking: one to adopt the technical corrections and one to approve a 30-day waiver. **Commissioner van der Vaart** asked why a waiver was needed. DWR responded that it was so that the rules could be corrected as soon as possible and because there was precedent for a 30-day waiver from a similar technical correction rule package last year for the Water Supply Watershed Program rules, so she was following that process.

Commissioner Deerhake made a motion to approve the 30-day waiver. **Commissioner McAdams** seconded the motion. The vote failed with 9 yes and 5 no. A two-thirds majority was needed for the motion to pass, and they failed to have the necessary 10 yes votes -. DWR staff will return to the EMC in May with the same proposed action.

20-11 Request Approval of Revised Nutrient Offset Rule (15A NCAC 02B .0240) Addressing Rule Review Commission Objection

John Huisman, DWR Planning section presented a request that the Commission adopt Rule 15A NCAC 02B .0240 as revised to address technical objection from the RRC. At its September 2019 meeting, the Commission adopted amendments to nutrient strategy rules for the Neuse and Tar-Pamlico River basins. The adopted rules were reviewed by the RRC at their December 19, 2019 meeting. The RRC approved all of the EMC rules with the exception to the Nutrient Offset Credit Trading Rule (.0240). The RRC objected to this rule based on the lack of statutory authority relating to proposed revisions establishing a point to nonpoint trading ratio for wastewater dischargers. In their objection, the RRC asserted that these proposed revisions would change standards in the Falls and Jordan nutrient strategy rules in contravention of Session Laws

2016-94 and 2018-5 which establish separate timelines for readopting those rules. Following the RRC objection, staff had worked with the EMC hearing officers to revise the rule language to address the objection and intend to bring the rule back to the RRC in March for approval. Following the presentation there were no questions or further discussion by the Commission.

Commissioner Anderson made a motion to approve revised Nutrient Offset Rule. **Commissioner Keen** seconded the motion. Final action was taken by the Commission by unanimously voting to approve the request to adopt Rule 15A NCAC 02B .0240 as revised.

III. Concluding Remarks

Directors' Comments

The division directors made their respective comments, the written version of which were published with the agenda and details of those comments can be found at:

<https://deq.nc.gov/about/divisions/water-resources/water-resources-commissions/environmental-management-commission-55>

Interim Director Brian Wrenn, Division of Energy, Mineral and Land Resources

Director Michael Scott, Division of Waste Management

Director Michael Abraczinskas, Division of Air Quality

Director Danny Smith, Division of Water Resources

Committee Chairs

Chair McAdams indicated that the Water Allocation Committee did not have a meeting, but they would have things lined up for the May meeting.

Chair Bailey reported that the Groundwater Waste Management Committee had two information items. One update was on a stakeholder process report on de-commissioning renewable energy equipment. The other update was on a proposed amendment to the 2L ground water quality standards.

Chair Deerhake indicated that the Water Quality Committee had a combination of action items and information items. The first of the two action items was a request for approval of technical corrections to Rules 15A NCAC 02B .0103, .0215, .0216, .0213 and .0233. The second item was a request for a major variance from the Goose Creek Riparian Area Protection rule by the City of Charlotte for phase 2 of the construction of the Stevens Creek Trunk Sewer. The variance was granted. We had two information items. The first item was an overview of the basin wide planning process. We will be seeing quite a number of basin plans coming before us in the next 2 years as they wrap up their 10-year increment of what is called cycle 4 of

the basin wide planning. We also discussed the Commission members volunteering to be liaisons to each of the 17 basins and we revisited who was assigned to which river basin, which basin wide staff planners are assigned to those. They welcomed Mr. Danny Smith as the Director of the Division of Water Resources.

Chairman Meiburg indicated that **Commissioner van der Vaart** agreed to take on the Broad River basin and Commissioner Monast agreed to take on the Neuse River and Watauga River basins.

Commissioner Solomon attributed credit to **Commissioner Deerhake** for her idea of that initiative and **Chairman Meiburg** stated that **Commissioner Deerhake** was the model for how you carry out that initiative.

Commissioner Deerhake added that they did have one other vacancy which was the White Oak River basin. She indicated that **Dr. Lazorick** was going to take that in addition to her work with the Tar Pamlico River basin. **Commissioner Harris** was going to assume responsibility for Chowan River basin and **Commissioner Carter** would be transferring over to the Roanoke River basin. She stated that they had an information item on the Jordan Nutrient Study that was conducted by the Collaboratory. This item was presented by Dr. Mike Piehler, the faculty of the Institute of Marine Sciences at UNC, and the Director of the Institute of the Environment of UNC, and by Dr. Dan Obenour, the faculty at NC State University. Dr. Piehler provided an overview of the findings and recommendations of each of the major components of that study. Dr. Obenour spoke about water quality and watershed modeling studies and provided some comparative analysis of the performance of them. The information from the study was useful and the committee will use it along with input from Division staff and the stakeholder efforts of Triangle J Councils of Government in the next one to two years. They hope that two other researchers on that team could come present in May, hopefully a speaker on behalf of the Environmental Finance Centers effort as well as a speaker on behalf of the School of Governments research portion. She stated that they closed the committee meeting with a hand-out that listed the suggested topics of interest to committee members to help them plan topics to discuss at future meetings.

Chairman Meiburg admitted that the Water Quality Committee was a very robust one. He commended the presentations from the Collaborators and indicated that they were really, quite thorough and reflected a tremendous amount of work that had gone on in basins and some eye-opening conclusions.

Chair Arata reported that the Air Quality Committee heard a presentation on the new 1-hr sulfur dioxide max designation. They heard a quick update from Director Abraczinskas about the Duplin County Air Monitoring Study, which is currently in draft phase. She stated that once a final study was done, she would ask that the Division of Air Quality would come back to report on those findings. She noted that the way Air Quality was handling fiscal analysis had been that when there was a time crunch, the Committee members had received a draft of the regulatory analysis. She stated that had been working well for the Committee, and if any Committee

member saw something that seemed off with the agenda or with the materials that were provided, to please say something and they could work that out at the Committee level.

Chairman Meiburg reported on the Executive Committee. He indicated one item on the agenda was the request for approval to proceed to the Commission which would come up at the next meeting on rules relating to hearings and including petitions and declaratory rulings and civil penalties. There would be some changes in Rule 02(l).0502 about reviews and they discussed what happens if it goes to a Committee vs going to a Commission. He encouraged the Committee to take a look at the rule proposal that was on the website because it was a change or at least a clarification of how to handle petitions, and how to handle requests for declaratory rulings.

Secondly, they received a report from Jennifer Everett on the point that **Commissioner Arata** raised about the timing on fiscal note developments and there was consensus among all the people. He stated that they would like to have as much information as soon as she could on fiscal notes and he thought it was fair to give that feedback to the staff. He indicated that there might be some differences of views about how far they needed to be along with that at the time of the Committee action on a particular rule. He indicated what came out of their discussion on this matter was that there were many Commission members who would like to get as much information at the Committee level as they possibly could.

Commissioner Comments

Commissioner van der Vart stated that he had sent an email to everybody for a couple of months expressing concern that he received about external agreements to the permitting process. He was just trying to figure out the next step. He requested this issue to be on the agenda for their next meeting and they could have an open discussion about that in terms of potentially rulemaking to clarify that process.

Commissioner Solomon stated that looking through the NPDES rules, the permitting part was granted through EMC rules. They had delegated that to some extent to the Department, and it was important that they keep that open. He stated that they were one providing that rule and the delegated authority and the ability to review anything that they would like to review.

Commissioner Deerhake informed members that Dr. Phillip Singer - Daniel A. Okun Distinguished Professor of Environmental Engineering at UNC's Gillings School of Global Public Health - passed away recently. He was an excellent teacher, a nationally renowned expert in water quality issues, and a member of the National Academy of Engineering.

Commissioner Carter stated he had a concern about the case coming before the Civil Penalty Remissions Group II Committee. In reviewing the case, there was something of particular note. Apparently there may have been false filings in the case by the party asking for remission of the penalty. He considered that to be the most serious kind of violation. He stated that the Commission needed to take note of that and deal with those kinds of things appropriately. He was going to have questions for the staff if they did have evidence of that as to why more stringent action was not taken, possibly including criminal sanctions in such a situation if false information was filed with the Department.

Chairman Meiburg stated that they had received word of a potential petition. There may be a need for a special meeting between then and May, indicated he would contact the Commission if that was the case. He indicated that everyone to please stay healthy and stay safe and safe travels back to their homes.

With no further business before the Commission, the Chairman adjourned the meeting at 10:55 a.m.

Approved this 7th day of May 2020.

Dr. A. Stanley Meiburg, Chairman
Environmental Management Commission